STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 19, 2011
v	No. 296943 Kalamazoo Circuit Court
JONATHAN WAYNE HENRY, Defendant-Appellant.	LC No. 2009-000609-FC

Before: HOEKSTRA, P.J., and MURRAY and M. J. KELLY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f), and third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to concurrent sentences of 12 to 40 years' imprisonment. Defendant appeals of right. We affirm.

I. FACTS

Testimony produced at defendant's trial established that shortly before midnight on August 18, 2008, the victim RH, who was 15 years old, and Raquel Ledezma, went for a walk in the trailer park where they lived with RH's mother. During their walk, they were approached by defendant and Shawn Brown, whom Ledezma knew. Neither RH nor Ledezma knew defendant. RH and Ledezma accepted the men's offer to hang out and watch movies at defendant's trailer.

RH testified that while in defendant's trailer, defendant offered to let her pick out a movie. She agreed and went to his bedroom where the movies were kept. Defendant followed RH into the bedroom and locked the door. He told RH that she was "gonna sleep with him and . . . suck his dick." RH tried to leave, but defendant grabbed her hair and arm and threw her onto the bed. He then grabbed RH by the neck and began to choke her. Defendant took off his pants and underwear, and demanded that RH do the same. RH resisted, but when defendant continued to choke her, she complied. Defendant penetrated RH's vagina with his penis. He also touched her breasts. When defendant finished, RH put her pants back on, unlocked the bedroom door and ran to her mother's trailer. Upon arriving back at her mother's trailer, RH did not tell her mother what had happened. She went into the bathroom, where she tried to "wipe off." She then curled up in a corner of her bedroom and cried herself to sleep.

The next evening, RH and her mother brought Ledezma to the hospital for reasons unrelated to the charges brought against defendant. At the hospital, RH told Ledezma and her mother about the sexual assault. Her mother brought RH home and called the police. Deputy Daniel Ruggles responded. Ruggles interviewed RH, and advised her to go to the YWCA for a medical exam. He told RH to bring the underwear she had been wearing the previous night with her. Ruggles followed RH and her mother out of the trailer park, and RH pointed out to him the trailer where the assault occurred. Ruggles then went to the trailer pointed out by RH. Defendant, who was not wearing a shirt, answered his knock on the door. According to Ruggles, defendant had several tattoos, including one of a boy's face and a birth date, and the tattoos matched descriptions given to him by RH.

Ruggles also put together a photograph lineup of six men. Defendant's picture was number six. Defendant had long hair in the picture, but he was bald in August 2008. Both RH and Ledezma viewed the lineup. When shown the photograph lineup, RH identified defendant as the man who assaulted her. Ledezma was also shown the photographs and picked two men, numbers 4 and 6, but leaned toward number 6 as the man who approached her and RH with Brown.

Linda Sweet, a sexual assault nurse examiner, examined RH at the YWCA and took samples for a rape kit, which included swabs from RH's vagina and the six pairs of underwear that RH had brought with her. The rape kit was submitted for forensic testing. The testing showed that semen was located on a vaginal swab and on a green pair of underwear included in the kit. Defendant could not be excluded as the donor of the sperm found on the vaginal swab and defendant's DNA matched the DNA obtained from the semen on the green pair of underwear.

Defendant testified that he got into an argument with his girlfriend, Sandra Againeses, on August 18, around 10:00 p.m. Sandra called her mother, who came to defendant's trailer along with her brother Norberto Againeses. After Sandra left with her mother, defendant and Brown followed Norberto to his house. They stayed at Norberto's house until about 3:00 a.m., and defendant did not get back to his trailer until 3:30 a.m. Defendant denied knowing anything about the sexual assault of RH.

II. PROSECUTORIAL MISCONDUCT

Defendant argues that he is entitled to a new trial because the prosecutor elicited testimony from Sweet and Ruggles that vouched for the credibility of RH. We disagree. We review these unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 541; 775 NW2d 857 (2009). Claims of prosecutorial misconduct are reviewed on a case-by-case basis, evaluating the prosecutor's conduct in context of the entire record. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Because the credibility of the witnesses is a determination for the fact-

finder, it is improper for a witness to comment on or provide an opinion of the credibility of another witness. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985).

Defendant claims that the testimony of Sweet, where she read from her report what RH told her about the sexual assault, improperly vouched for the credibility of RH. However, as defendant admits, "[s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations . . . as reasonably necessary to such diagnosis and treatment" are an exception to the hearsay rule. MRE 803(4). Statements by a sexual assault victim to a sexual assault nurse examiner concerning the sexual assault are admissible under MRE 803(4). *People v Garland*, 286 Mich App 1, 8-9; 777 NW2d 732 (2009). Moreover, while Sweet testified as to what RH told her about the assault, Sweet was never asked to opine or comment on RH's credibility. Accordingly, we find no misconduct in the prosecutor's request that Sweet read from her report RH's description of the sexual assault.

Defendant also claims that Ruggles' testimony that, during his interview of RH, that RH cried, kept her head down, and failed to make eye contact improperly vouched for the credibility of RH. Contrary to defendant's assertion, this testimony by Ruggles did not vouch for the credibility of RH. Ruggles merely explained RH's demeanor during the interview, and RH's demeanor was relevant to the jury's credibility determination of RH.[1]

Further regarding Ruggles' testimony, defendant claims that questions asked by the prosecutor during redirect examination of Ruggles constituted improper vouching. During redirect the prosecutor asked Ruggles whether during the interview RH appeared credible, waivered on any details, was inconsistent in anything she said, and had an appropriate demeanor for a sexual assault victim. Ruggles answered that RH did not waiver and was consistent on the details and had an appropriate demeanor.[2]

However, on cross-examination, defense counsel had asked Ruggles why, "[i]f it was such a heinous crime," he did not arrest defendant on August 20, when he visited defendant's trailer. Ruggles replied that he wanted to get more evidence. The prosecutor's questions on redirect that defendant is challenging, and those asked immediately before by the prosecutor, elicited further explanation from Ruggles regarding why he did not arrest defendant that night. Ruggles, through the questioning, explained that based on his interview with RH, he had probable cause to arrest defendant, but he chose not to because he wanted to conduct a "thorough investigation." Under these circumstances, the prosecutor's questions to Ruggles were not

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[1] Ruggles further testified that RH's demeanor was not uncommon for a teenage sexual abuse victim, especially when questioned by a male police officer. The testimony was based on Ruggles's perception of RH and was helpful to the determination of a fact in issue. MRE 701. Defendant makes no argument that this testimony was improper testimony from a lay witness.

[2] According to the transcript, Ruggles provided no answer to the question whether RH appeared credible.

improper because they responded to questions that had been asked by defense counsel on cross-examination. See *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007).

III. DOUBLE JEOPARDY

Next, defendant claims that his convictions and sentences for CSC I and CSC III violate the double jeopardy protection against multiple punishments for the same offense. Specifically, defendant asserts that the trial court erred in finding the present case analogous to *Garland*, 286 Mich App 1. We disagree. We review de novo defendant's double jeopardy challenge. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

The constitutional prohibitions against double jeopardy, US Const, Am V; Const 1963, art 1, § 15, protect an individual against multiple punishments for the same offense. *Nutt*, 469 Mich at 574. The Court in *Garland*, 286 Mich App at 4-5, stated:

> To determine whether a defendant has been subjected to multiple punishments for the "same offense," we must first look to determine whether the Legislature expressed a clear intention that multiple punishments be imposed. Where the Legislature clearly intends to impose such multiple punishments, there is no double jeopardy violation. Where the Legislature has not clearly expressed an intention to impose multiple punishments, the elements of the offenses must be compared using the *Blockburger*[3] test.
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> Under the *Blockburger* test, if each offense "requires proof of a fact which the other does not" then there is no violation of double jeopardy. However, because the *Blockburger* test is simply a tool used to ascertain legislative intent, the focus must be on a comparison of the abstract legal elements of the offenses and not on the particular facts of the case. [Citations omitted.]

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[3] *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932)

In this case, following the preliminary examination, defendant was bound over for trial on CSC I, MCL 750.520b(1)(f) (sexual penetration accomplished through force and coercion and causing personal injury), and CSC III, MCL 750.520d(1)(a) (sexual penetration with a person at least 13 years of age and under 16 years). On the first day of trial, the prosecutor moved to amend the information to include the CSC I and CSC III offenses as separate, rather than alternative, charges. He argued that the case was "on all fours" with *Garland*. The trial court agreed, and granted the motion to amend. Following trial, defendant was convicted of CSC I and CSC III, and sentenced to 12 to 40 years' imprisonment for each conviction.

In *Garland*, the defendant engaged in two acts of sexual penetration: sexual intercourse and cunnilingus. For each act of sexual penetration, the defendant was tried and convicted of two criminal offenses: CSC I on the theory that a sexual penetration occurred during the commission of a felony, MCL 750.520b(1)(c), and CSC III on the theory that the victim was physically helpless, MCL 750.520d(1)(c). The Court determined that the *Blockburger* test must be used to determine whether the defendant's convictions violated double jeopardy protections

because nowhere in the CSC chapter of the criminal code did the Legislature express an intent to impose multiple punishments. *Garland*, 286 Mich App at 5. Looking at the "abstract, statutory elements" of the CSC offenses with which the defendant was charged, the Court held that the defendant's convictions did not violate double jeopardy protections. *Id.* at 5-6. It explained:

> MCL 750.520b(1)(c) requires proof that the sexual penetration occurred "under circumstances involving the commission of any other felony." This is not an element of MCL 750.520d(1)(c). MCL 750.520d(1)(c) requires proof that the sexual penetration occurred and was accompanied by the actor knowing or having "reason to know that the victim [was] . . . physically helpless." This is not an element of MCL 750.520b(1)(c). Thus, under the *Blockburger* test, because each offense contains an element that the other does not, CSC I and CSC III are separate offenses for which defendant was properly convicted and sentenced, without violating defendant's double jeopardy protection against multiple punishments. [*Id.*]

Here, looking at the abstract, statutory elements of the CSC I and CSC III offenses with which defendant was charged, we hold that defendant's convictions and sentences for the offenses do not violate defendant's double jeopardy protections. MCL 750.520b(1)(f) requires proof of a sexual penetration and that "[t]he actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration." Personal injury and force or coercion are not elements of MCL 750.520d(1)(a). MCL 750.520d(1)(a) only requires proof of a sexual penetration with another person who "is at least 13 years of age and under 16 years of age." The victim's age is not an element of MCL 750.520b(1)(f). Accordingly, because each offense contains an element that the other does not, defendant's convictions and sentences for CSC I and CSC III do not violate defendant's constitutional protections against double jeopardy.

IV. RECALLING OF THE VICTIM

Defendant also argues that he was denied a fair trial when the prosecutor was permitted to recall RH to the witness stand after Ludezma and Ruggles had testified. We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Jones*, 270 Mich App 208, 211; 714 NW2d 362 (2006). Unpreserved claims of evidentiary error are reviewed for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Initially, we find unavailing defendant's suggestion that recalling RH was improper because she was allowed to remain in the courtroom after she testified and thus was present when Ledezma and Ruggles were testifying. As the victim, RH had the right to remain in the courtroom after she testified. MCL 780.761[3]

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[3] MCL 780.761 provides:

Regarding the recall of RH after Ledezma testified, the record shows that during her testimony, RH stated that she told her mother and Ledezma about the sexual assault the same night it happened while the three of them were at the hospital. But Ledezma, who testified after RH, stated that she was brought to the hospital by RH and her mother the night after the sexual assault; she specifically testified that the assault and her admission to the hospital did not occur the same night. RH was in the courtroom during Ledezma's testimony.

Following Ledezma's testimony, the prosecutor, without objection by defendant, recalled RH to the witness stand. He asked RH whether Ledezma's testimony that the hospital trip occurred about 24 hours after the sexual assault "change[d her] answers" about when she went to the hospital and disclosed the assault. RH replied, "Yes," and explained that after she ran to her mother's trailer, she cried herself to sleep. As she was crying, it became daylight, and it was evening when she awoke and that was when Ledezma was taken to the hospital.

We discern no abuse of discretion by the trial court in allowing the prosecutor to recall RH to the witness stand after Ledezma testified. Moreover, it is apparent that RH's testimony did not prejudice defendant. RH admitted that she heard Ledezma's testimony and that, as a result, she was changing her testimony. In addition, Ledezma's testimony and the "changed" testimony of RH were corroborated by Ruggles. Ruggles testified that RH's mother called the police at approximately 4:30 a.m. on August 20, that he interviewed RH thirty minutes later, and that RH reported she was sexually assaulted between 1:00 and 3:00 a.m. on August 19. There was no plain error affecting defendant's substantial rights.

As to the recall of RH after Ruggles testified, the record shows that during his testimony, Ruggles stated that he observed tattoos on defendant, and that the tattoos, including one of a boy's face with a birth date below it, were consistent with tattoos described by RH. After his testimony concluded, the prosecutor requested permission to recall RH because he had "forgot[ten]" to ask RH about defendant's tattoos on direct examination, and now wanted to question RH about them. Over defense counsel's objection, the trial court allowed the prosecutor to recall RH.

Again, we find no abuse of discretion in the trial court's decision to allow the prosecutor to recall RH to the witness stand to question her about defendant's tattoos. In this instance, the trial court limited the prosecutor's examination of RH to the tattoos that she had seen on defendant, a line of questioning that the prosecutor neglected to ask on direct examination. Further, as was the case with the recall of RH after Ledezma's testimony, the reason for allowing the recall of RH was readily apparent to the jury. And regardless, we conclude that the recall of RH to the witness stand was not outcome determinative. Ruggles had already testified that the

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> The victim has the right to be present throughout the entire trial of the defendant, unless the victim is going to be called as a witness. If the victim is going to be called as a witness, the court may, for good cause shown, order the victim to be sequestered until the victim first testifies. The victim shall not be sequestered after he or she first testifies.

tattoos he observed on defendant were similar to the tattoos described by RH. Moreover, RH identified defendant as the person who assaulted her, and defendant's DNA matched the DNA of sperm found on RH's underwear. Given this identification evidence, it does not affirmatively appear more probable than not that the recall of RH to the witness stand affected the outcome of defendant's trial. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly